I therefore find that there are triable issues as regards the construction of the contract which should go for trial. I therefore allowed the appeal with costs and granted the defendants unconditional leave to defend.

Appeal allowed.

Solicitors: *Geh Cheng Lok & Co; Yeang & Co.*

Reported by *Yap Shao Sin*

Cham Yoon Liang v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) - CRIMINAL APPLICATION NO 44-9-89
MOHTAR ABDULLAH JC
22 JULY 1989

Preventive Detention - Habeas corpus - When period of detention to commence and end - Date of making the order different from date of commencement of detention - Bona fides of Minister - Detention prior to detention order - Whether authorized - Onus on detaining authorities to justify detention - Failure to comply strictly with statute - Whether defects in earlier detention made whole detention bad in law - Technical defects relied upon by applicant - Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3(2)(a), (b), (c) & 6(1)

The applicant alleged that he was arrested on 11 February 1989 in the purported exercise of powers under the Dangerous Drugs Act 1952 and was further detained in the purported exercise of powers under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') for a total of 74 days with no charges preferred against him in a court of law. On 22 April 1989 the Deputy Minister ('the Minister') of Home Affairs made a detention order directing that the applicant be detained for two years with effect from 25 April 1989. The applicant contended that the Act allowed detention for two years from the date of the order, ie the making or signing the order, and the expiry of the detention on 24 April 1991 would exceed two years from the making of such order by the Minister.

The applicant did not specifically challenge the legality of the detention from 11 February 1989 up to the issuance of the detention order. However the court allowed further affidavits to cover the relevant periods of detention.

Held, granting an order for habeas corpus:

(1) From the whole scheme of the Act, the detention order made on 22 April 1989 for a period of two years from 25 April 1989 was correct, proper and not in violation of s 6(1) of the Act. The Minister had stated in his affidavit that the detention order was made in good faith and the Act has been properly applied to the applicant. The court does not question the satisfaction of the Minister so unequivocally stated nor doubt the bona fides of the Minister.

(2) In a habeas corpus proceeding under the Criminal Procedure Code where the evidence show that the detainee has been under continuous detention purportedly under separate laws or by separate authorization, it is incumbent upon the authorities to justify the detention by the production of the relevant lawful detention order or authorization.

(3) There was no affidavit affirming the validity of the detention of the applicant from 11 February 1989 to 25 February 1989 under the Dangerous Drugs Act. No order of any magistrate under s 117 of the Criminal Procedure Code was produced to cover the detention beyond the initial 24 hours of the original arrest. In the circumstances a doubt exists as to whether the detention of the applicant for the initial 14-day period was legal.

(4) Under the Act, the police can detain the applicant, for the purpose of investigation, for a period of 60 days. The provisos in s 3(2) of the Act are clear as regards detention. From the affidavits filed, the detention for the first 48 hours seems lawful. However, a copy of the purported authorization beyond 48 hours under s 3(2)(b) was in fact an authorization under s 3(2)(c) for further detention for an additional 46 days. Mere averment in the affidavit without the production of the relevant authorization is insufficient to discharge the burden to show lawful detention.

(5) There was also no proper authorization under s 3(2)(c) for the detention beyond 14 days because (a) the police officer was below the rank of deputy superintendent; (b) there was no affirmation that he reported the matter to the Inspector-General; (c) if the detention was valid, there was a gap of 11 days between that detention and the commencement of the detention order by the Minister.

(6) The allegations by the respondents that by a mistake of fact a wrong form was used and that the cyclostyled forms adopted were intended for administrative convenience and records purposes were a misconceived view of a police officer's responsibility under the Act. Although there are no prescribed forms under the Act, those in use were authorized by the Attorney-General's chambers and therefore officially sanctioned for the purpose of the exercise of power of detention as stipulated by the Act. The use of the wrong form cannot be a mere irregularity in view of the fact that each form prescribes for the different exercise of powers under different provisions of the law by officers of different rank.

(7) Section 3(2)(c) of the Act is strict and clear. The deputy superintendent shall report only to the Inspector-General or a police officer designated by him. The affidavit did not show that the procedural requirement had been complied with.

(8) Although the Minister had acted bona fide, there were vital defects in the earlier periods of detention which were bad in law. A person applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Civil Appeal No 5-72 of 1989.]

Cases referred to

1 *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45; [1988] 2 MLJ 301 (folld)
2 *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184 (folld)

Legislation referred to

Criminal Procedure Code s 117
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(a), (b), (c), 6(1)

Tan Hock Chuan for the applicant.
Abu Samah bin Nordin for the respondents.

Cur Adv Vult

Mohtar Abdullah JC: The applicant alleges:

(a) that he was arrested on 11 February 1989 by the police in purported exercise of the powers under the Dangerous Drugs Act 1952 (Act 234);
(b) that on 25 February 1989 the applicant was further detained by the police in purported exercise of the powers under the Dangerous Drugs (Special Preventive Measures) Act 1985 - hereinafter referred to as 'the Act';
(c) that in spite of being detained by the police for a total of 74 days, no charges were preferred against him in a court of law.

Subsequently on 22 April 1989 the Deputy Minister of Home Affairs (hereinafter referred to as 'the Minister') made a detention order directing that the applicant be detained for a period of two years with effect from 25 April 1989, ie until 24 April 1991. The detention order is dated 22 April 1989. By s 6(1) of the Act, 'the Minister may ... by order ... direct that such person be detained for a period not exceeding two years *from the date of such order*'. It is the applicant's contention that the term 'from the date of such order' in s 6(1) refers to the date on which the minister made or signed the detention order, ie 22 April 1989 and not the date '25 April 1989' which was the date the period of detention was stated to commence. Therefore the two-year period of detention should commence from the date of making of signing the order, ie 22 April 1989 and should end on 21 April 1991. In the circumstances, the applicant submits that since the detention order authorizes the detention of the applicant until *24 April 1991*, it has therefore exceeded the two-year period in violation of s 6(1) and is therefore illegal, unlawful and unconstitutional.

From the language of s 6(1) and the whole scheme of the Act, I find the detention order signed by the Minister on 22 April 1989 authorizing the detention of the applicant for a period of two years from 25 April 1989 to be correct, proper and not in violation of s 6(1) of the Act. The Minister, by his affidavit, has stated that he was satisfied that the applicant has associated himself in activities relating to dangerous drugs, and that it was necessary in the interest of public order that the applicant be detained. He further averred that 'the detention order against the applicant was made in good faith and that the Act has been properly applied to the applicant'. I must stress here that the court does not question the satisfaction of the Minister so unequivocably stated, nor doubt the bona fides of the Minister and that as far as the action of the Minister is concerned, the Minister has properly applied the Act to the applicant.

However the same cannot be said as regards the actions of the police officers who were involved in the detention of the applicant prior to the making of the detention order by the Minister.

In this application, evidence is by affidavits in support of each party's case. The applicant produced three affidavits, two affirmed by him on 28 June and 2 July 1989 and one by his wife affirmed on 21 July 1989.

The respondents produced six affidavits, viz:

(i) two affidavits of ASP Zakaria, one affirmed on 12 July 1989 and a supplementary affidavit affirmed on 21 July 1989;
(ii) affidavit of Khairiyah bte Md Shahabudin (an assistant secretary attached to the Ministry of Home Affairs) affirmed on 12 July 1989;
(iii) affidavit of the Minister also affirmed on 12 July 1989;
(iv) affidavit of DSP Haji Hasbullah bin Yusoff affirmed on 21 July 1989; and
(v) affidavit of Inspector Dzulkifli bin Haji Asmawi affirmed on 21 July 1989.

The applicant contends specifically that the detention order is illegal, unlawful and unconstitutional. There is no specific challenge to the legality of the detention from 11 February 1989 up to the issuance of the detention order. However, I hold that in a habeas corpus proceeding under Cap 36 of the Criminal Procedure Code and where the evidence by the various affidavits show that the detainee has been under continuous detention purportedly under separate laws or by separate authorization, it is incumbent upon the detaining authorities to justify the detention by the production of the relevant lawful detention order or authorization. In the circumstances I have allowed both the applicant and the respondents to file further affidavits to cover the relevant periods of detention. Hence, the supplementary affidavit of ASP Zakaria and the affidavits of DSP Haji Hasbullah and Inspector Dzulkifli are filed by the respondents, and the affidavit of the applicant's wife is filed by the applicant.

The respondents have discharged the onus placed on them in respect of the two-year detention at Pusat Pemulihan Akhlak, Muar, by the production of the detention order by the Minister. In respect of the periods of detention by the police, the respondents produced firstly the affidavit of ASP Zakaria who averred as follows:

(a) that he arrested and detained the applicant for the purpose of investigations under s 3(1) of the Act, and lodged a police report (exh ZA1);
(b) that on 27 February 1989 at about 11.30am, he authorized the further detention of the applicant for an *additional period beyond 48 hours* under s 3(2)(b) of the Act (exh ZA2).

I note that, despite the leave granted by the court to file further affidavits, there is no affidavit by any police officer affirming the validity of the detention of the applicant from 11 February 1989 until 25 February 1989 under the Dangerous Drugs Act. No order of any magistrate under s 117 of the Criminal Procedure Code, if any, is produced to cover the detention of the applicant beyond the initial 24 hours of the original arrest on 11 February 1989. I am aware it would normally be the practice, as required by law, for the police to produce a suspect before a magistrate for an order under s 117 of the Criminal Procedure Code - but the court cannot assume that the police had done so in the present case! In the circumstances a doubt exists as to whether the detention of the applicant for his initial 14-day period is lawful or not.

Under the Act the police can detain the applicant, for purposes of investigation, for a period of 60 days. The provisos in s 3(2) are very clear as regards the continued detention of the applicant under s 3:

(a) he shall not be detained for more than 24 hours except with the authority of a police officer of or above the rank of Inspector;
(b) he shall not be detained for more than 48 hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;
(c) he shall not be detained for more than 14 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by him in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

As affirmed by ASP Zakaria the applicant was arrested under s 3 of the Act at 2.20pm on 25 February 1989. Therefore: (i) the 24th hour would be 2.20pm on 26 February 1989; (ii) the 48th hour would be 2.20pm on 27 February 1989; and (iii) the 14th day would commence from 2.20pm on 11 March 1989. The detention of the applicant for the first 24 hours is unquestionably valid. For the next 24 hours, there is the affidavit by Inspector Dzulkifli who produced the relevant authorization under s 3(2)(a) to affirm the validity of the detention for that period beyond 24 hours. The detention of the applicant for the first 48 hours would seem to be lawful.

ASP Zakaria affirmed that on 27 February at 11.30am, he authorized the further detention of the applicant beyond 48 hours under s 3(2)(b). A copy purportedly of the said authorization under s 3(2)(b) was produced and marked exh ZA2. When I peruse the said exh ZA2 I find that it is in fact an authorization under s 3(2)(c), authorizing the further detention of the applicant for an additional 46 days from 2.20pm on 27 February 1989. This means that on record ASP Zakaria was authorizing the detention of the applicant under s 3(2)(c) until 2.20pm on 14 April 1989.

From the affidavit of ASP Zakaria and exh ZA2 there seems to be no proper authorization under s 3(2)(b) for the detention of the applicant beyond 48 hours. The mere averment by ASP Zakaria in his affidavit to that effect, without the production of the relevant authorization, is insufficient to discharge the burden on the respondent to show lawful detention under s 3(2)(b). There also seems to be no proper authorization under s 3(2)(c) for the detention of the applicant beyond 14 days because:

(a) ASP Zakaria is below the rank of a deputy superintendent stipulated in s 3(2)(c);
(b) assuming for a moment that ASP Zakaria is a properly authorized officer there is no affirmation by ASP Zakaria that, in accordance with the requirement of s 3(2)(c), he has reported the matter to the Inspector-General (or to a police officer designated by the Inspector-General);
(c) even assuming again that the authorization by ASP Zakaria under s 3(2)(c) is valid, there is a gap of about 11 days from 14 April (the 46th day) to 25 April (the commencement of the two-year detention under the detention order) unaccounted for or not covered by any lawful authorization for detention.

To overcome this problem, the respondents produce the supplementary affidavit of ASP Zakaria and the affidavit of DSP Haji Hasbullah. Let me deal first with ASP Zakaria's supplementary affidavit wherein he stated, inter alia:

(a) that he did authorize the further detention of the applicant for an additional period beyond 48 hours under s 3(2)(b) but 'by mistake of fact' a different form as in exh ZA2 was used (ie the form for authorization under s 3(2)(c));
(b) that there are no prescribed forms under s 3(2)(b) and (c) of the Act and that the cyclostyled forms adopted by the police are intended for administrative convenience and record purposes only.

I agree that the Act does not prescribe the forms to be used; but the forms to be used and in fact used by the police (as seen in the exhibits attached to the affidavits of these three police officers) are authorized by the Attorney-General's chambers. All the forms carry the note, at the bottom, as follows: 'Borang ini diluluskan oleh Jabatan Peguam Negara mengikut surat PN(PU2) 437 bertarikh 22 Julai 1985'. These are forms officially sanctioned for the purpose of the exercise of the powers of the detention as stipulated by the respective provisos of s 3 and in fact used as documentary proof of lawful custody thereof in every habeas corpus proceeding under the Act. For a

police officer to affirm that the authorization forms are merely for administrative convenience and record purpose only is regretfully a misconceived view of a police officer's responsibility under the Act. The use of the wrong form cannot be a mere irregularity in view of the fact that each form prescribes for the different exercise of powers under different provisions of the law by officers of different ranks.

I deal now with the affidavit of DSP Haji Hasbullah who produced the proper form of the authorization under s 3(2)(c) to justify the applicant's detention beyond 14 days, with effect from 10.20am on 11 March 1989. In his affidavit, DSP Haji Hasbullah affirmed that 'on 3 March 1989 I reported the circumstances of the arrest and detention of one Cham Yoon Liang to Senior Assistant Commissioner 1 Mohd Ghazali Bin Yaacob'. There is no averment by DSP Haji Hasbullah that he reported to the Inspector-General or that Senior Assistant Commissioner 1 Mohd Ghazali was a 'police officer designated by the Inspector-General in that behalf' under s 3(2)(c). The proviso in s 3(2)(i) is strict and clear - the DSP shall report, not to any superior police officer, but to the Inspector-General himself or to a particular police officer designated by the Inspector-General for this purpose! The rationale for this provision is clear - the highest ranking police officer or a special police officer designated by him should be informed before the subject is to be deprived of his liberty for a longer period. It is then the duty of the Inspector-General or this designated officer to forthwith report the matter to the Minister. I therefore hold that DSP Haji Hasbullah's affidavit does not show that the procedural requirement in s 3(2)(c) has been complied with. The submission from the Bar that Senior Assistant Commissioner 1 Mohd Ghazali is in fact the officer so designated by the Inspector-General is insufficient to discharge the burden on the respondents to show due compliance with the requirement of s 3(2)(c).

In my event, as I see it, no police officer who knows his rank, who understands Bahasa Malaysia and who reads (as he should) the form he is issuing to authorize the detention of a subject under the Act can honestly plead 'mistake of fact' in using the wrong form. If, in fact, he actually makes that mistake, it is a clear reflection of the fact that he has not applied his mind to the proper exercise of his power under the relevant section of the Act.

I therefore hold:

(a) that the respondents have failed to produce the authorization under s 3(2)(b) for the detention of the applicant beyond 48 hours;
(b) that the wrong use of exh ZA2 by ASP Zakaria is not a mere 'factual irregularity' but constitutes a breach of the law and procedure prescribed in s 3(2)(b) and (c) of the Act; and
(c) that, even assuming that s 3(2)(c) has been complied with by the evidence adduced from the affidavit and authorization by DSP Haji Hasbullah, there would be on record before this court two sets of authorization under s 3(2)(c) by two different officers which would cast doubt on the propriety of the two police officers' actions and the lawfulness of their respective order in the circumstances of this case.

I find that there are large gaps in the respondents' case in that some of the actions of the police officers in arresting and detaining the applicant have not been properly and conclusively shown to be made in accordance with the procedure and powers provide either under s 117 of the Criminal Procedure Code or under s 3 of the Act.

Although I find, as stated earlier, that the Minister has acted bona fide and in accordance with law as far as his actions are concerned, the vital defects in respect of the earlier periods of detention by the police would make the whole detention bad. (See *Koh Yoke Koon's* case.[1])

In *Ex parte Johannes Choeldi & Ors*,[2] Rigby J said to the effect that where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith.

The initial periods of the detention being proved to be technically defective, I have no alternative but to hold that the continued detention of the applicant is consequently bad in law. I therefore make a formal order granting habeas corpus and setting the applicant free.

Application granted.

Solicitors: *Kam Koon Wah & Co.*

Reported by *Yap Shao Sin*